IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA CENTRAL DIVISION

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)	CIVIL NO. 4-02-CV-10090
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Plaintiff seeks review of the Commissioner of Social Security's decision denying him disability insurance benefits under Title II of the Social Security Act, 42 U.S.C. §§ 1381 *et seq*. Pursuant to 42 U.S.C. §§ 405(g) and 1383(c)(3), this Court may review the final decision of the Commissioner.

I. PROCEDURAL HISTORY

Will Rogers, age 43 on the date of the hearing, applied for disability benefits on September 27, 1999, alleging disability since July 31, 1997. Plaintiff's claim was denied initially and on reconsideration. On June 12, 2001, following a hearing, an administrative law judge ("ALJ") found plaintiff was not disabled under the meaning of the Act.

On December 20, 2001, the Appeals Council of the Social Security Administration denied plaintiff's request for review. Plaintiff commenced the present action for judicial review on February 21, 2002.

II. FINDINGS OF THE COMMISSIONER

The ALJ found the medical evidence to establish that plaintiff suffers from "severe obesity, status post right wrist arthrodesis and borderline intellectual functioning." Tr. 20.

The ALJ concluded, however, that plaintiff does not have an impairment or combination of impairments listed in, or medically equal to one listed in Appendix 1, Subpart P, Regulations No. 4. Tr. 20. The ALJ determined plaintiff's allegations of total disability were not credible. Tr. 24.

The ALJ found plaintiff has the residual functional capacity ('RFC") to:

lift and carry to waist level no more than 10 pounds frequently and 25 pounds occasionally. He can frequently lift 10 pounds to the shoulder, and can never lift more than 10 pounds overhead. He needs to wear an orthopedic splint on his wrist. He must avoid repetitive, vigorous grasping, pinching, pushing, pulling, and twisting motions. He is to work at a reduced speed. He cannot use vibrating tools. The claimant can work with normal breaks [,] walk, stand, and/or sit for up to six hours each in an eight-hour workday. He can occasionally climb, stoop, kneel, and crawl. He is limited as far as immersion of his right hand into any type of water or severe temperature changes. He has a full scale IQ of 80.

Tr. 22-23. As a result of his mental impairment, the ALJ concluded claimant has "no limitation of activities of daily living; no limitation of social functioning; mild limitation of concentration, persistence, or pace; and no episodes of decompensation within one year, each lasting for at least two weeks." Tr. 21.

The ALJ found plaintiff was unable to perform his past relevant work. Tr. 21. The ALJ nevertheless concluded that a significant number of jobs exist in the national economy that plaintiff is able to perform. These jobs include: surveillance system monitor, storage facility rental attendant, bottling line attendant and library page. Tr. 21. Accordingly, the ALJ concluded plaintiff was not under a "disability" as defined in the Social Security Act, "at any time through the date of this decision." Tr.

III. APPLICABLE LAW AND DISCUSSION

A. Governing Law

A court must affirm the decision of the Commissioner if substantial evidence on the record as a whole supports the decision. 42 U.S.C. § 405(g). "Substantial evidence is less than a preponderance, but enough so that a reasonable mind might accept it as adequate to support a conclusion." *Johnson v. Chater*, 108 F.3d 942, 943 (8th Cir. 1997). A court may not reverse merely because substantial evidence would have supported an opposite decision. *Locher v. Sullivan*, 968 F.2d 725, 727 (8th Cir. 1992). "If, after review, [the Court] find[s] it possible to draw two inconsistent positions from the evidence and one of those positions represents the Commissioner's findings, [the Court] must affirm the denial of benefits." *Mapes v. Chater*, 82 F.3d 259, 260 (8th Cir. 1996).

B. Whether Vocational Expert Testimony Contradicts the DOT

Plaintiff first argues that the vocational expert's testimony that plaintiff can perform the jobs of surveillance-system monitor and bottling-line attendant conflicts with the *Dictionary of Occupational Titles* ("DOT") specifications for the positions. Specifically, plaintiff argues that the DOT assigns a "level three language requirement" to the position of surveillance-system monitor, DOT # 379.367.010, and a "level one language requirement" to the position of bottling-line attendant, DOT # 920.687-042).

The Eighth Circuit repeatedly has held that *DOT* definitions for particular occupations "represent[] the 'approximate maximum requirements for each position, rather than [the] range." *Carlson v. Chater*, 74 F.3d 869, 871 (8th Cir. 1996) (quoting *Jones v. Chater*, 72 F.3d 81, 82 (8th

Cir. 1995)); see also Wheeler v. Apfel, 224 F.3d 891, 897 (8th Cir. 2000) ("The DOT itself cautions that its description may not coincide in every respect with the content of jobs as performed in particular establishments or at certain localities.") (citing *Hall v. Chater*, 109 F.3d 1255, 1259 (8th Cir. 1997).

In the present case, plaintiff's attorney questioned the vocational expert in detail regarding the language requirement for the surveillance monitor position. Tr. 89-91. The vocational expert then clarified that the position he contemplated was "one where he'd be working like at Walmart monitoring TV screens of the parking lot, you know, for people fooling around with cars or something of that nature." Tr. 91. Because he provided a reasonable explanation for the discrepancy between plaintiff's language abilities and the DOT classification, the Court finds the vocational expert's opinion is not flawed simply because "not all of the jobs in every category have requirements identical to or as rigorous as those listed in the DOT." Wheeler, 224 F.3d at at 897; see also SSR 00-4p, 2000 WL 1765299 (requiring that the ALJ obtain a "reasonable explanation" for differences between vocational expert testimony and DOT classifications). The Court finds substantial evidence supports the finding that plaintiff could perform the position of surveillance systems monitor as contemplated by the vocational expert. Because the vocational expert did not provide the same explanation with regard to the bottling-line attendant, however, the Court will not include this position among those within plaintiff's RFC. See Young v. Apfel, 221 F.3d 1064 (8th Cir. 2000) (if not rebutted with vocational expert testimony, DOT controls).¹

¹ Plaintiff did not expressly challenge the ALJ's finding that he could perform the position of library page, which, according to the DOT, has a level 2 reading requirement, or storage facility rental attendant, which has a level 3 reading requirement. *See DOT* §§ 249.687-014 and 295.367.026, respectively. From the manner in which the vocational expert described these positions during the

The vocational expert testified during the hearing that the there are 300 surveillance monitor positions in Iowa and 25,000 nationally. These numbers are within the range the Eighth Circuit has considered sufficient to constitute a "significant number." *See, e.g., Hall v. Chater*, 109 F.3d 1255, 1259 (8th Cir. 1997) (340 jobs in state that would actually accommodate claimant's restrictions considered significant); *Jenkins v. Bowen*, 861 F.2d 1083, 1087 (8th Cir. 1988) (500 jobs in *region* considered significant).²

C. Whether ALJ Appropriately Considered Impact of Plaintiff's Obesity

Plaintiff next contends the ALJ failed to consider the impact of plaintiff's obesity. This Court disagrees.

Social Security Ruling 00-3p, which was in effect at the time the ALJ issued her opinion, provides:

There is no specific level of weight or BMI that equates with a "severe" or a "not severe" impairment. Neither do descriptive terms for levels of obesity (e.g., "severe," "extreme," or "morbid" obesity) establish whether obesity is or is not a "severe" impairment for disability program purposes. Rather, we will do an individualized assessment of the impact of obesity on an individual's functioning when deciding whether the impairment is severe.

hearing, however, it does not appear he contemplated that plaintiff would in fact be required to read and/or communicate frequently. *See* Tr. 86-87.

² Plaintiff also contends that a private vocational evaluator opined that plaintiff should consider part-time work, and that "job-carving" might be required. Tr. 224-26. As noted by the ALJ, however, the evaluator's opinion was based in part over plaintiff's prior legal diffculties, "which is not a significant factor under Social Security Administration evaluation of disability." Tr. 18. The evaluator's opinion that plaintiff should consider part-time work is not controlling, and unsupported by the record. None of plaintiff's physicians imposed a similar limitation.

SSR 00-3p, 2000 WL 628049 at *4 (Social Security Administration 2000) ("SSR 00-3p").³ The Ruling goes on to recognize that "[t]he combined effects of obesity with other impairments may be greater than might be expected without obesity. For example, someone with obesity and arthritis affecting a weight-bearing joint may have more pain and limitation than might be expected from the arthritis alone." *Id.* at *6. The Ruling specifically states that: "As with any other impairment, we will explain how we reached our conclusions on whether obesity caused any physical or mental limitations. *Id.* at *7.

In her written decision, the ALJ appropriately found plaintiff was obese, and that his combined impairments "more than minimally affect his ability to perform basic work activities." Tr. 15. She then noted that consultative examiner John Brady, D.O., opined that plaintiff's obesity might restrict his ability to "walk, move about, climb, stoop, kneel, and crawl," and included these restrictions in her RFC findings. Tr. 17, 20. The additional physical limitations adopted by the ALJ also are consistent with those suggested by plaintiff's treating orthopedic surgeon, Delwin Quenzer, M.D., who performed surgery on plaintiff's forearm. Tr. 282.

Based on the ALJ's statements and the evidence of record, the Court finds the ALJ's opinion to be consistent with SSR 00-3p, which requires that the examiner consider whether obesity causes limitation of function or exacerbates the effects of other recognized impairments. SSR 00-3p at *6-7. Although the ALJ admittedly could have been more thorough in her written analysis, the Court

³ The SSA issued a new ruling on obesity, SSR 02-1P, which superceded SSR 00-3p effective September 12, 2002. SSR 02-1p specifically indicates there were no substantive changes to the procedure contained in SSR 00-3p.

disagrees with plaintiff's contention that she failed to provide *any* explanation for her treatment of plaintiff's obesity. *See* Tr. 13, 20.

C. Whether ALJ Properly Considered Third-party Statements

Lastly, plaintiff contends the ALJ failed to properly evaluate the statements of plaintiff's former employers. On the contrary, the ALJ expressly referenced the letters in her written opinion, noting that plaintiff's former employers "stated he was a good employee and failed to mention that he required any particular special consideration." Tr. 19. A review of the letters at issue confirms the ALJ assessment. Tr. 212-17. Although the letters clearly support plaintiff's overall credibility and work ethic, they do not impact the ALJ's RFC findings. Plaintiff's argument on this issue therefore is without merit. *But see Smith v. Heckler*, 735 F.2d 312, 316-17 (8th Cir. 1984) (ALJ committed reversible error in failing to evaluate third-party statements specifically addressing plaintiff's ability to work).

IV. CONCLUSION

For the reasons outlined above, IT IS ORDERED that the decision of the Commissioner is affirmed. The Clerk of Court is directed to enter judgment in favor of defendant and against plaintiff. IT IS ORDERED.

Dated this 6th day of March, 2003.

United States District Court